

BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between

{ Grievant }

Record of Proceeding

FSGB No. 2006-011

And

July 14, 2006

Department of State

**DECISION: TIMELINESS –
EXCISION**

For the Foreign Service Grievance Board:

Presiding Member:

Garvin L. Oliver

Board Members:

Robert J. Bigart
Thomas Jefferson

Special Assistant:

Joseph Pastic

Representative for the Grievant:

Pro Se

Representative for the Department:

Joanne M. Lishman
Director
Grievance Staff

Employee Exclusive Representative:

American Foreign Service Association

DECISION: TIMELINESS

I. THE GRIEVANCE

In a letter dated April 22, 2006, {Grievant} appealed to this Board the January 3, 2006 decision of the Department of State (Department, agency) denying a grievance he filed on October 3, 2005. He claimed that the Department failed to document training, a letter of commendation, and award nominations that he had received in his Official Performance File (OPF). He alleges that these errors caused him harm by making him less competitive before the 2005 Selection Board (SB). He also claimed that the Department violated the provisions of the USERRA.¹

In his appeal, grievant requested an “extension/waiver of the time limit” for filing an appeal, due to the fact that he was called away from the Department on military leave for active duty.²

This Decision relates to the timeliness of grievant’s appeal to this Board.

II. BACKGROUND

Grievant’s appeal was received by the Board on May 2, 2006. In our May 11, 2006 acknowledgment letter we advised grievant and the agency that we would first consider the issue of the timely filing of his appeal. The Board requested grievant to specify the date on which he received the Department’s January 3, 2006 decision letter and invited him to provide the Board with additional information to support his request for a filing extension. We also advised the Department that it may submit a brief on this matter.

¹ Uniformed Services Employment and Reemployment Rights Act of 1994 (38 U.S.C. 4301 *et seq.*)

² Grievant provided a copy of his Department of the Army orders, dated October 19, 2005.

The Board received grievant's response on May 15 and the Department's reply was received on June 16.

III. POSITIONS OF THE PARTIES

Grievant

In his response to the Board, {Grievant} advised that he could not "... specify the exact date I received the Department's January 3, 2006 decision on my grievance, however from the best of my recollection it was on or about April of 2006. The Department ... had my home address and my military address."

Further, grievant said:

... Additional information to support my request is pursuant to President George W. Bush's authorization of a partial mobilization of the reserve force for the national emergency of homeland defense and civil support missions in response to terrorists attacks ... This authorization legally allowed the Secretary of Defense ... to use the presidential order to involuntarily mobilize and activate me.

Agency

The Department's position is that grievant has not established that his appeal is timely or that grant of an extension or waiver of the time limit is appropriate in this case. The Department noted that notwithstanding the Board's May 11 letter expressly directing that grievant specify the date he received the Department's decision, {Grievant} merely indicated that he received it in April.

In its reply to the Board, the Department submitted a copy of a returned certified mail receipt which it claims shows that its decision was received at grievant's home address on January 9, 2006, and signed for by someone whose surname appears to be "{Grievant}." In light of this, the grievant had until March 10, 2006, to file an appeal but he did not do so until April 22. Grievant has not provided any evidence to rebut the

presumption that the decision was received on January 9. Accordingly, the appeal should be dismissed as untimely.

Grievant has also failed to meet his burden of proving that good cause exists to support a decision by the Board to waive the filing deadline. The fact that grievant is on active duty does not dispose of the issue of whether to grant a waiver. Grievant has not shown why his active duty status has prevented him from maintaining regular contact with the Department or from taking care of matters relating to his employment with the Department, such as receiving documents from the Department and requesting an extension of time to file an appeal.

. . . contacting AFSA to file an appeal on one's behalf or sending an email to the Board indicating that he wished to file an appeal and requires an extension is a simple action that is not particularly time consuming . . . {Grievant} offers no adequate explanation . . . as to why he previously (*i.e.*, in January-March 2006) was not in a position to receive the Department's January 3, 2006 letter and/or to attend to matters affecting his State Department employment

IV. DISCUSSION AND FINDINGS

The Board's rules, at 22 CFR 903.1, provide, in part, that a member of the Foreign Service is entitled to file a grievance with the Board no later than 60 days after receiving the agency decision. Section 903.1 provides further that the Board may extend or waive the time limits stated in that section for good cause. We consider the parties' submissions within the parameter of whether grievant has shown good cause to extend or waive the filing date of the appeal. Grievant has the burden of proving, by a preponderance of the evidence, such good cause.

In FSGB Case No. 98-071 (April 1, 1999), the Board articulated its application of good cause, citing FSGB Case No. 92-005 (March 31, 1992): "Good cause means

generally a substantial reason, one that would impel a reasonably prudent person, under the relevant circumstance, to act or refrain from acting.” In FSGB Case No. 2000-040 (July 6, 2000), the Board applied MSPB guidance established in *Alonzo v. Dept. of Air Force*, 4 MSPB 180, 184, 186 (1980) in making its decision. Specifically, the factors³ to be considered in determining if good cause is shown are:

1. Length of delay
2. Notice
3. Circumstances beyond employee’s control
4. Negligence
5. Excusable neglect
6. Unavoidable casualty
7. Prejudice to agency

With these standards in mind, we examine the material factors provided by the parties to determine whether there is good cause for waiving the time limits.

The record shows that the January 3, 2006, agency letter denying {Grievant}’s grievance informed him that he could appeal to the Board within 60 days. The certified registered mail receipt provided by the Department shows that this letter was delivered to grievant’s home address on January 9, 2006. The receipt shows that a person⁴ at that address signed the receipt on that date. We find therefore that the letter was delivered and received at grievant’s home address on January 9, 2006. Accordingly, grievant was required to send any appeal to the Board by March 10, in order to meet the 60-day timeline.

Grievant’s appeal to the Board was dated April 22, 2005,⁵ approximately 43 days after the end of the 60-day filing period. His appeal did not indicate the date he received

³ Referred to as the *Alonzo* factors.

⁴ The name in the “Received by (printed name)” block of the receipt appears to be “Shequrah {Grievant}.”

⁵ Clearly, the grievant intended to date his appeal April 22, 2006.

the Department's January 3 letter, but it is clear that grievant was aware that his appeal was not timely, as he requested "... an extension of the time limit for 'good cause' ..."

In his May 15, 2006, response to our May 11 letter, in which we asked him to specify the date he received the Department's January 3 letter, grievant stated that he could not specify the exact date, but that "from the best of my recollection it was on or about April of 2006."

Grievant did not provide the Board a specific date that he received the Department's letter, nor has he provided evidence showing that his appeal was filed within the time limit. He did not indicate that he was not living at his residence during this time nor has he cited any problems he might have had in receiving mail. In his correspondence to and from the agency and the Board, he used his address and never advised that he was not reachable at that address or that another address should be used in correspondence to him. Indeed, he confirmed that the Department "had my home address ..."

In view of the evidence provided by the Department, *i.e.* the certified mail receipt showing that the letter was delivered to and received at grievant's home address on January 9, we conclude that grievant did not file his appeal within the 60 day time limit.

We turn now to the question of whether {Grievant} has shown good cause that a waiver of the time limit should be granted by the Board. He claims that there is "good cause ... due to the fact that I was ... called away from the Department ... for active military duty." However, he did not provide any further explanation as to why or how his active duty military status would have prevented him from receiving his mail or conducting normal business correspondence with the Department or any other entity. His

U.S. Army orders directed that he report to an address in Norfolk, Virginia. Yet he provided no evidence showing that he advised the Department that this address or some other address should have been used in correspondence to him.

Grievant also claimed that the Department violated the USERRA in denying his grievance. This law protects grievant, as a serviceman, from discrimination, including the denial “of any benefit of employment,” which includes his right to file a grievance with the agency and an appeal to this Board. We find that grievant has provided no evidence of discrimination nor has he asserted that he has suffered discrimination with respect to the matter of the timely filing of his appeal.

This Board is cognizant of the challenges that American servicemen and servicewomen on active as well as reserve duty face in this time of war, and we appreciate and support their efforts. We are aware also that these challenges might make it difficult for some of them to stay abreast of their personal and business affairs. Yet we find in grievant’s case that he has not met the burden of proving that his claim of good cause for a waiver of the time limit has merit, for he has provided no evidence showing that he faced any difficulties while on active duty that would have prevented him from attending to matters concerning his grievance and appeal in a timely manner. Moreover, we find that none of the *Alonzo* factors sustain his claim that there is good cause for a waiver.

Accordingly, we dismiss his appeal on the grounds that it not timely.

V. DECISION

The grievance appeal is dismissed, with prejudice.